103

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No. 07-1336

IN THE

Supreme Court of the United States

COLLEEN V. WILCOX, et al.,

Cross-Petitioner,

v.

UNITED STATES ex rel.
JOHN DAVID STONER,

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether state officials are "person[s]" amenable to suit in their personal capacity under the False Claims Act.

2. Whether the Eleventh Amendment applies to a False Claims Act suit by a *qui tam* relator against state officials sued in their personal capacity if the United States declines to intervene in the suit.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
STATEMENT 1
ARGUMENT 5
CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Adams v. Rankin County Bd. of Educ.,
524 F.2d 928 (5th Cir. 1975) 10

Ambus v. Granite Bd. of Educ.,
995 F.2d 992 (10th Cir. 1993) 10

Campbell v. Gadsden County Dist. Sch. Bd.,
534 F.2d 650 (5th Cir. 1976) 10

Clark v. Martinez,
543 U.S. 371 (2005) 14

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003) ..... *passim*

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 9

Duke v. Grady Mun. Schs.,
127 F.3d 972 (10th Cir. 1997) 10

Fay v. South Colonie Cent. Sch. Dist.,
802 F.2d 21 (2d Cir. 1986) 10

Gary A. v. New Trier High Sch. Dist. No. 203,
796 F.2d 940 (7th Cir. 1986) 10

Hafer v. Melo,
502 U.S. 21 (1991) 12, 14

Minton v. St. Bernard Parish Sch. Bd.,
803 F.2d 129 (5th Cir. 1986) 10

Narin v. Lower Merion Sch. Dist.,
206 F.3d 323 (3d Cir. 2000) 10

Rainwater v. United States,
356 U.S. 590 (1958) 1, 14

Rosa R. v. Connelly,
889 F.2d 435 (2d Cir. 1989) 10

Stewart v. Baldwin County Bd. of Educ.,
908 F.2d 1499 (11th Cir. 1990) 10

Stoddard v. School Dist. No. 1, 590 F.2d 829
(10th Cir. 1979) 10

Stoner v. Santa Clara County Office of Educ.,
128 S. Ct. 1728 (2008) (No. 07-1093) 5

Unified Sch. Dist. No. 480 v. Epperson,
583 F.2d 1118 (10th Cir. 1978) 10

United States ex rel. Burlbaw v Orenduff,
No. 06-2006 (10th Cir. argued Mar. 5, 2007) 8

United States ex rel. Gaudineer & Comito,
L.L.P. v. Iowa, 269 F.3d 932 (8th Cir. 2001) ... 5, 6, 7

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 13

Vermont Agency of Natural Resources v.
United States ex rel. Stevens,
529 U.S. 765 (2000) 1, 3, 6

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 9

Statutes

18 U.S.C. 287 2

31 U.S.C. 3729(a)(1) 1, 4

31 U.S.C. 3730(b)(2) 1

31 U.S.C. 3730(c)(3) 1

31 U.S.C. 3730(d) 1

42 U.S.C. 1983 13

Other Authorities

2008 California Rules of Court, Rule 9.40(a)(1) 8

Brief in Opposition, *United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, No. 01-1645, 2002 WL 32134714 (2002)..... 7

Statement of Patrick Leahy, *Hearing of the Senate Committee On the Judiciary: The False Claims Correction Action (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud For The 21st Century*, 110th Cong., 2d Sess. 2008 WLNR 4359143 (Feb. 27, 2008)..... 10

STATEMENT

1. The False Claims Act, 31 U.S.C. 3729 *et seq.*, is the government's primary tool for combating fraud against the federal Treasury. Among other things, the Act provides for civil penalties and damages to be assessed against "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). Suits to collect those civil penalties and statutory damages may be brought either by the Attorney General or by a private relator in the name of the United States, in an action known as a *qui tam* suit. See 31 U.S.C. 3730(a) and (b)(1); see generally *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); see also *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003). When a *qui tam* action is initiated, the government is given the opportunity to intervene and to take over the suit. 31 U.S.C. 3730(b)(2), (b)(4), and (c)(1). If the government declines to intervene, the relator conducts the litigation in the name of the United States. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in a recovery, the award is allocated between the government and the relator, regardless of whether the government intervened in the case. 31 U.S.C. 3730(d).

Congress intended the False Claims Act's terms to apply "broadly" in order "to protect the funds and property of the government from fraudulent acts" in whatever form they might appear. *Rainwater v. United States*, 356 U.S. 590, 592 (1958). Accordingly, in defining the "person[s]" subject to suit, "Congress wrote expansively, meaning to reach all types of

fraud, without qualification, that might result in financial loss to the Government." *Chandler*, 538 U.S. at 129.[1]

2. John David Stoner is a former employee of the Santa Clara County Office of Education (Santa Clara County), where he served from December 2001 through June 2003 as a teacher of students with severe disabilities. Pet. App. 24a, 55a-56a. In October 2003, he filed *pro se* a False Claims Act *qui tam* suit in the United States District Court for the Northern District of California against Santa Clara County, the East Side Union High School District (East Side District), and Santa Clara employees Colleen Wilcox, Joe Fimiani, and David Wong. His complaint alleged, *inter alia*, that, during his employment, he had witnessed actions by the defendants that made their certifications of the County's compliance with federal laws and regulations, including the Individuals with Disabilities Education, 20 U.S.C. 1400 *et seq.*, false. Those false certifications were undertaken to obtain disbursements of federal funds for certain educational programs, in violation of the False Claims Act. Although Stoner had raised those concerns with his employer during the 2002-2003 school year, they went unaddressed during his employment. *Id.* at 3a, 24a.

The district court dismissed the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6),

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[1] Congress also enacted criminal penalties for the submission of false claims to the federal government. 18 U.S.C. 287.

on the ground that the defendants were not "person[s]" subject to suit under the False Claims Act. Pet. App. 23a-38a. Based on this Court's decision in *Stevens*, *supra*, which held that States are not "person[s]" amenable to suit under the False Claims Act, 529 U.S. at 778-788, the court held that neither Santa Clara County nor East Side District could be sued because, under Ninth Circuit law, they are considered to be arms of the State. Pet. App. 30a-36a. On that same basis, the district court held that the individual defendants could not be sued in their official capacities. *Id.* at 36a-37a.

The district court also held that the suit could not proceed against the individual defendants in their personal capacities because "Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question." Pet. App. 37a. Although Stoner had alleged that the defendants, in knowingly submitting false claims, had "abused their authorities," the court held without further explanation that "such allegations do not suffice." *Ibid.*

Finally, the district court held that the entire action was subject to dismissal in any event because a *qui tam* False Claims Act suit cannot be prosecuted *pro se*. Pet. App. 28a-30a.

3. Stoner appealed, and the United States appeared as *amicus curiae* in support of Stoner's argument that government employees sued in their personal capacities are subject to suit under the False Claims Act.

The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-22a. The court affirmed the dismissal of Santa Clara County and the

East Side District on the ground that the County and District are arms of the State protected by Eleventh Amendment immunity. *Id.* at 6a-12a. The court of appeals further noted that Stoner did not contest the dismissal of the individual defendants in their official capacities and, accordingly, "express[ed] *no opinion* on the merits of the district court's conclusion" on that question. *Id.* at 12a.

Relying on the "plain language" of the False Claims Act, the court of appeals reversed the district court's holding that the individual defendants could not be sued in their individual capacities in the absence of a showing that their actions exceeded the scope of their official responsibilities. Pet. App. 12a; see *id.* at 12a-16a. The court explained that "person" in the False Claims Act "includes 'natural persons.'" *Ibid.* (citing *Chandler*, 538 U.S. at 125). The court accordingly held that Stoner's allegations that the individual employees "knowingly presented or caused to be presented false or fraudulent statements to the United States * * * to obtain federal funds" were "sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1)." Pet. App. at 13a.

Finally, the court of appeals affirmed the district court's holding that Stoner could not prosecute the *qui tam* lawsuit *pro se*, Pet. App. 16a-22a, and held that the district court "should dismiss this action, without prejudice to the government," unless Stoner either obtained counsel or permission to appear *pro hac vice* within a "reasonable time." *Id.* at 21a-22a.

ARGUMENT

The court of appeals' interlocutory ruling is correct and does not conflict with the decision of any other circuit. Accordingly, this Court's review is not warranted.[2]

1. Petitioners argue (Pet. 16-22) that this Court's review is warranted at this interlocutory juncture because there is a division in the decisions of lower courts on the question of whether state officials may be sued in their personal capacity under the False Claims Act. There is, however, no conflict in the circuits on the questions presented – as petitioners admit (Pet. 17 n.7, 32) – and the handful of differing decisions in district courts that petitioners identify can be resolved by the circuit courts of appeals. There thus is no reason for this Court's intervention at this premature juncture.

Petitioners contend (Pet. 16-17) that the decision of the Ninth Circuit here is in tension with the Eighth Circuit's ruling in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (2001), cert. denied, 536 U.S. 925 (2002). But there is neither tension nor conflict between those rulings.

In *Gaudineer*, the plaintiff originally sued the defendants only in their official capacities for their compliance with a policy for admission to the

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[2] Although the defendants are cross-petitioners for certiorari, because Stoner's own petition for certiorari has already been denied, *Stoner v. Santa Clara County Office of Educ.*, 128 S. Ct. 1728 (2008) (No. 07-1093), we refer to the cross-petitioners as "petitioners" for ease of reference.

Medicaid program for mentally retarded individuals. 269 F.3d at 934. Following this Court's decision in *Stevens*, Gaudineer sought to amend the complaint to restate the identical claim as a personal-capacity claim against the sole individual defendant in the case.

The Eighth Circuit upheld the district court's denial of the motion for leave to amend the complaint, noting that substantial proceedings and discovery had already been undertaken in the case. 269 F.3d at 935. In so holding, the court of appeals agreed with the district court's conclusion that amendment would be futile because Gaudineer alleged only that the individual official "had been implementing a state policy on behalf of [the Department of Human Services] and had performed no acts in his individual capacity." *Id.* at 935-936. The Eighth Circuit explained that the amended complaint, although nominally targeted at the individual in his personal capacity, challenged a formal agency policy and, as a result, "would require Iowa to alter its waiver program." *Id.* at 937. The allegations of the amended complaint, moreover, challenged the formal promulgation of official "standards that conflicted with state laws." *Ibid.* Because the amended complaint focused on official conduct and would affect a formal state "waiver program," the court held that, "[u]nder these circumstances," the district court did not err in denying the motion for leave to amend to add a new claim against the official in his individual capacity. *Ibid.*

Importantly, the Eighth Circuit stressed that it was *not* "consider[ing] whether a state official sued in

his individual capacity is a person under the [False Claims Act] or whether the claims against [the official] are barred by the Eleventh Amendment." 269 F.3d at 937 n.3. Those questions – the very questions presented here (Pet. i) – thus remain open within the Eighth Circuit.[3]

Moreover, the Eighth Circuit's denial of leave to amend the complaint has little relevance here, where (i) the original complaint sued the defendants in their individual capacities, Pet. App. 11a; C.A.E.R. Tab 30, pp. 13-14; (ii) no motion to amend late in the proceedings is at issue, (iii) the nature of the allegations – that the defendants deliberately falsified reports of compliance with federal disabilities laws – does *not* implicate any formal state governmental programs or policies, and (iv) the relief requested would not require the alteration of any state program. Instead, the claims recite the very type of individual misfeasance that state law does not countenance, see Calif. Educ. Code §§ 41344, 56845, and thus present traditional allegations of individual-capacity action by governmental officials.

Petitioners also identify (Pet. 17-22) some conflicting district court decisions. What petitioners overlook is that the Ninth Circuit's decision here eliminates any tension in the law within that Circuit.

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[3] The brief in opposition to certiorari filed by the State of Iowa in the *Gaudineer* case underscored that the Eighth Circuit's decision was narrow and case-specific, and did not decide the broad question of state officials' amenability to suit in their personal capacity. See Br. in Opp. at *3, *7-*8, *United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, No. 01-1645, 2002 WL 32134714 (May 17, 2002).

See Pet. 19-20 (seeking review based on contrary district court rulings within the Ninth Circuit). Furthermore, the questions presented have not yet been considered by other courts of appeals, which remain fully capable of harmonizing the remaining district court rulings that petitioners cite. There thus is not, and may never be, any conflict in the circuits for this Court to resolve.[4]

2. This Court's review would be particularly premature not only because there is no conflict in the circuits, but also because this case is in an interlocutory posture. The court of appeals held only that the district court erred in dismissing the complaint for failure to state a claim and remanded for further proceedings. Pet. App. 22a. In addition, the court of appeals separately ordered the case dismissed *in its entirety* unless, on remand, Stoner obtains permission to appear *pro hac vice* or obtains trial counsel. *Id.* at 21a-22a. Stoner has not yet been admitted *pro hac vice*, and it is unclear whether the local rules would permit such admission because he is a California resident. See 2008 California Rules of Court, Rule 9.40(a)(1) (stating that "[n]o person is eligible to appear as counsel *pro hac vice* under this rule if the person is * * * [a] resident of the State of California").[5]

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[4] The question of whether state officials are amenable to personal-capacity suits under the False Claims Act is currently pending in the Tenth Circuit. See *United States ex rel. Burlbaw v Orenduff*, No. 06-2006 (10th Cir. argued Mar. 5, 2007).

[5] In addition, Stoner's efforts to obtain trial counsel have not yet been finalized.

The case thus is in a profoundly preliminary posture. If the case proceeds at all in district court, there will be ample opportunity for this Court's review of the merits and viability of Stoner's claims, should it be warranted, after a final judgment is rendered. There is no need to disrupt the litigation at this early juncture before questions of immunity, liability, and appropriate relief have even been considered by the district court. See Pet. App. 15a n.3.

Indeed, "the general rule" is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). For that reason, this Court routinely denies review of cases in such an interlocutory posture. See, *e.g.*, *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (citing additional authorities). Further proceedings in district court could result in a judgment favorable to the petitioners, thereby obviating any need for this Court's review. In any event, there is no reason to depart in this case from the "general rule" against piecemeal appellate review, with all of its attendant resource costs (for both parties and the courts) and disruption of the district court's efficient management of the case.

Beyond that, Congress is currently considering bipartisan legislation that would amend the False Claims Act. See S. 2041, 110th Cong., 1st Sess.

(Sept. 12, 2007); H.R. 4854, 110th Cong., 1st Sess. (Dec. 19, 2007). The pending bills were designed in part to respond to "recent court decisions." Statement of Patrick Leahy, *Hearing of the Sen. Comm. On the Judiciary: The False Claims Correction Action (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud For The 21st Century*, 110th Cong., 2d Sess. 2008 WLNR 4359143 (Feb. 27, 2008). The pendency of such legislation makes interlocutory review at this early juncture especially inappropriate.

3. Notwithstanding the absence of an inter-circuit conflict and the case's interlocutory posture, petitioners contend (Pet. 32-34) that review is warranted because of the burden the court of appeals' decision allegedly would impose on state treasuries. But this case is a particularly inapt vehicle for consideration of that issue because it concerns the liability of *district* and *county* education officials. In most States, district and county education officials are already subject to suit under the False Claims Act. That is because, in most jurisdictions, education officials and agencies are not arms of the state and thus are fully amenable to a False Claims Act suit under this Court's decision in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).[6]

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[6] Other courts of appeals, as well as the Ninth Circuit with respect to States other than California, have frequently declined to hold that local school districts and boards are arms of the state. See, *e.g.*, *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1181-1189 (9th Cir. 2003) (Alaska); *Savage v. Glendale Union High School Dist.*, 343 F.3d 1036, 1041-1051 (9th Cir. 2003) (Arizona), cert. denied, 541 U.S. 1009 (2004);

Thus, for the vast majority of petitioners' counterparts across the country, both Congress and this Court have already rejected the very policy arguments advanced by petitioners here. See *Chandler*, 538 U.S. at 129-134 (rejecting arguments against coverage of local government officials based on treble damages provision, need to protect taxpayers, and government's extensive participation in federal funding programs). This case accordingly provides a poor vehicle for considering whether the practical and federalism implications of extending False Claims Act liability to state officials in their personal capacity would be distinct from the already accepted extension of similar liability to tens of thousands of local governmental defendants under *Chandler*.

Eason v. Clark County Sch. Dist., 303 F.3d 1137, 1142-1144 (9th Cir 2002) (Nevada), cert. denied, 537 U.S. 1190 (2003); *Narin v. Lower Merion Sch. Dist.*, 206 F.3d 323, 331 n.6 (3d Cir. 2000); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 981-982 (10th Cir. 1997); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 997 (10th Cir. 1993); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1511 (11th Cir. 1990); *Rosa R. v. Connelly*, 889 F.2d 435, 438 (2d Cir. 1989), cert. denied, 496 U.S. 941 (1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27-28 (2d Cir. 1986); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986); *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 131-132 (5th Cir. 1986); *Stoddard v. School Dist. No. 1*, 590 F.2d 829, 835 (10th Cir. 1979); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1123 (10th Cir. 1978); *Campbell v. Gadsden County Dist. Sch. Bd.*, 534 F.2d 650, 655-656 (5th Cir. 1976); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975), cert. denied, 438 U.S. 904 (1978).

4. The decision of the court of appeals is correct for three reasons. First, the plain language of the False Claims Act states without qualification that "any person" who knowingly submits or causes the submission of false claims to the United States is subject to liability, and the ordinary and established meaning of that term includes natural persons like petitioners. See 1 U.S.C. 1; *Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'"). Nothing in the statute creates an exception for government officials in their personal capacities, and certainly not for officials whose status as local or state officials varies significantly from State to State. Quite the opposite, the False Claims Act expressly denominates which natural persons are excluded from its coverage. See 31 U.S.C. 3730(e)(1) & (2) (excepting members of the armed forces, members of Congress, members of the Judiciary and certain listed senior executive branch officials). Congress did not include personal capacity suits against state officials on that list, and that textual omission must be given effect. *Bank of State of Alabama v. Dalton*, 50 U.S. 522, 529 (1850) ("Wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to those exceptions. The rule is established beyond controversy.").

Second, nothing in the text, history, or purposes of the False Claims Act calls for the exclusion of petitioners from the class of persons covered by the Act in 1863, when the statute was originally enacted. To the contrary, *Chandler* establishes that "person"

encompassed governmental officials in 1863, and that understanding is confirmed by the widespread inclusion of state officials in their personal capacity under 42 U.S.C. 1983, which was enacted by the 1871 Congress – within eight years of the False Claims Act's passage. While petitioners contend that the political relationship of the States to the federal government changed during that time period, they offer no evidence at all that either the ordinary meaning of the word "person" changed, or that *Congress's* view of the relationship between the States and the federal government with respect to false claims changed in the short interval between the two statutes.

In fact, the Congress that enacted the False Claims Act was specifically concerned with incidences of fraud committed by state officials in the procurement of military supplies for state troops. *See* Government Contracts, H.R.Rep. No. 37-2, pt. ii-a (1862). This 1862 Report noted that hearings had revealed an "unpardonable eagerness" on the part of state officials to engage in "fraud and speculation" in connection with "large and lucrative government contracts." *Id.* at XXXVIII, XXXIX. The Congress that enacted the False Claims Act just one year after the issuance of that Report thus was particularly unlikely to have carved out individual state officials from the Act's compass. Rather, debates at the time suggest that the Act was intended "to reach all types of fraud, *without qualification*, that might result in financial loss to the Government." *Chandler*, 538 U.S. at 129 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)) (emphasis added).

Third, petitioners' narrow construction of the statute is inconsistent with the broad purpose of the False Claims Act, which has consistently been construed expansively to cover all frauds upon the United States, including frauds perpetrated by government officials. *See Chandler, supra; Rainwater v. United States*, 356 U.S. 590, 592 (1958). Reading artificial limitations into the ordinary sweep of the term "person" would immunize an entire class of individuals from False Claims Act liability – individuals who "are commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power." *Chandler*, 538 U.S at 129. The definition that petitioners proffer, moreover, would preclude suit not only by *qui tam* relators, but also by the United States itself, because the single term "person" applies equally regardless of who pursues the False Claims Act suit to conclusion. Cf. *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

5. With respect to the second question presented, petitioners offer no distinct argument in support of certiorari. Respondent Stoner is aware of no conflict in the circuits on the question, or any authority at all that would support the notion that the Eleventh Amendment applies to personal capacity suits. Indeed, the settled law is that the Eleventh Amendment has no application in that context. See, *e.g.*, *Hafer*, 502 U.S. at 30-31.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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